43152-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

AMANDA BRADY GUARDIAN MALLORY BROUSSARD,
Plaintiff/Appellant,

v.

WILLIAM REINERT and EVERGREEN SCHOOL DISTRICT
Defendant/Respondents

BRIEF OF RESPONDENT EVERGREEN SCHOOL DISTRICT

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I. INTRODUCTION

Washington law is clear. A school district has no statutory or common law duty to protect students outside of its custody and over whom it has not exercised and assumed supervision and control. When injured, M.B. was crossing a city street, near a school she did not attend, well after the school day had ended and at least five or six minutes after the school safety patrol had been dismissed.

On summary judgment, the trial court dismissed M.B.'s negligence case against the School District, stating: "this court finds no legal duty for the District to have crossing guards out at the time of the incident ..." CP 270.

The facts of this case are not in dispute. Duty is an issue of law. The trial court's decision was an appropriate application of Washington law and should be upheld.

II. STATEMENT OF THE CASE

On November 13, 2009, at 3:06 or 3:07 p.m., a vehicle driven by Defendant William Reinert struck 12-year-old M.B. as she attempted to cross SE 7th Street at the westernmost of the two crosswalks in front of Crestline Elementary School. CP 32; CP 35. The accident occurred 16 or

17 minutes after the Crestline dismissal bell rang. CP 52.

The western crosswalk is raised and marked with striping and signs. CP 34; CP 63. Reinert, who had been parked in Crestline's parking lot, pulled out, turned left on SE 7th Street, and headed west toward the crosswalk. His vision was not obstructed. CP 68. He simply did not notice M.B. or her three companions in time to stop. CP 62-64; CP 69. Reinert was cited and did not contest the charge. CP 39; CP 65-66. He admitted being negligent. CP 67.

M.B. saw Reinert's vehicle as soon as it pulled out of the parking lot and headed her way, but calculated that she had enough time to cross the street safely. CP 79-80; CP 97-99. But for Reinert's negligence, she would have crossed without incident. The distance between the crosswalk and the point at which Reinert pulled out of Crestline's parking lot is approximately 148 yards or 444 feet. Reinert described the distance as "maybe the length of a football field." CP 61. He wasn't far off. The length of an American football field, including the end zones, is approximately 120 yards or 360 feet. Generally speaking, Reinert had ample time to stop. CP 43-44.

M.B. did not attend Crestline Elementary. CP 73. She attended nearby Wy'East Middle School, which ended at 2:30 p.m. CP 71; CP

235. On the day of the accident, she and a friend walked to Crestline from the middle school in order to escort her mother's former boyfriend's[1] twins to her mother's new apartment,[2] located across the street from Crestline. CP 79; CP 72; CP 77. It wasn't something M.B. typically did. She did it that day because her mother telephoned her at school with the request. CP 77; CP 79. In the six weeks prior to the accident that M.B.'s mother lived in that apartment with her three biological children, M.B. had walked the twins from Crestline to the apartment only three or four times. CP 78; CP 77; CP 87-88. Generally, the twins went home after school. They lived with their father on 136th Avenue, a location that did not require crossing SE 7th Street. Prior to October 2, 2009, the date her mother and the twin's father separated, M.B. and her mother and siblings also lived at the 136th Avenue address. CP 37-38; CP 45-46.

Crestline Elementary had an adult-supervised school patrol that provided crossing assistance at the crosswalk where the accident happened. The adult traffic monitor in charge of the school patrol was

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[1] Amanda Brady is not the biological mother of the twins, nor was she ever legally married to their father, Christopher Brady. CP 76; CP 36. The relationship between Amanda Brady and Christopher Brady ended in October 2009. CP 45-46; CP 75.

[2] Amanda Brady moved to the apartment across the street from Crestline after her relationship with Christopher Brady ended. As of the date of the accident, she had only lived there about six weeks. CP 77. Neither M.B.'s school records nor the twin's school records reflect the new address. CP 37-38.

Theresa Oliver-Philossof. CP 83, CP 192-193. She was the individual responsible for blowing the whistle to dismiss the students and her adult assistant from patrol duty. CP 83; CP 91. While she reported to Principal Hite, as Hite commented, "she [Oliver-Philosoff] is the safety patrol ..." CP 192.

Oliver-Philosoff and Hite both received and gave safety patrol training. The year before the accident, Hite, Oliver-Philosoff and the students on patrol received training from the Vancouver Police Department. CP 193. Hite sought and received feedback on 7th Street and the safety patrol from her District supervisor. CP 203. In addition, Oliver-Philosoff received training in the form of a handbook and a CD published by AAA. CP 212-213.

In the afternoon, Oliver-Philosoff would not dismiss the school patrol until after the last bus left and "the bus was out of the driveway and down the road and there was no visible children in sight, then I would blow the whistle and we would be released." CP 82-83; CP 85.

Busses normally left Crestline between 2:50 and 3:00 p.m. CP 82-83, CP 193. Most of Crestline's students rode the bus and were out and gone by the time the busses left. CP 53-54. A few Wy'East students typically walked from their school to Crestline. If they were there to cross

SE 7th, and were visible when the Crestline student patrol was on duty, they were also assisted across the street by the Crestline student patrol. CP 56-57; CP 88-89.

As a former Crestline student patrol member, M.B. knew that the patrol completed their work shortly after the busses departed. CP 98. So did her mother. CP 74.

Oliver-Philossof and her adult assistant, Sarah Lawer, were the supervisors for the school patrol on the day of the accident. CP 85. Consistent with the patrol's practice, on the day of the accident Oliver-Philossof released Lawer and the student patrol members from their stations shortly after 3:00 p.m. The busses had departed and, as was typical, there were no children intending to cross visible. CP 85; CP 91; CP 93-94; CP 95; CP 98. Lawer signed out at 3:04 p.m. and left to go home. CP 55, CP 58-59; CP 84. Oliver-Philossof made sure all the equipment was put up, locked the door to the equipment room, and was walking into the office when the accident happened. CP 86.

III. ARGUMENT

1. Plaintiff's tort claim against the Evergreen School District requires duty and proximate cause.

The elements of negligence are (1) the existence of a duty owed

by the defendant to the plaintiff, (2) breach of that duty, and (3) injury to plaintiff, (4) proximately caused by the breach. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). M.B. cannot, as a matter of law, establish that the School District had a duty to protect her from the negligence of a third-party motorist when the accident occurred 16 or 17 minutes after the school day ended on a city street adjacent to a school she did not attend. Nor can Plaintiff show that the relationship between her accident and the absence of the school patrol was proximate, justifying the imposition of responsibility on the School District.

2. A school district is a creature of statute, limited in its powers. By statute, Washington school districts are not required to have school patrols.

School districts are municipal or quasi-municipal corporations, governed by statute. "As mere inventions of the legislature, they 'can exercise *only* such powers as the legislature has granted in express words, or those necessary or fairly implied in, or incident to, powers expressly granted or those essential to the declared objects and purposes of such district'" *Federal Way Sch. Dist. v. Vinson,* 172 Wn.2d 756, 765, 261 P.3d 145 (2011) (quoting *Noe v. Edmonds Sch. Dist. No. 15,* 83 Wash.2d 97, 103, 515 P.2d 977 (1973) (emphasis added)).

RCW 46.61.385 authorizes the appointment and operation of

school patrols but does not impose a duty to exercise the power. A school district has wide discretion in the exercise of its powers and the establishment of school patrols is within its discretion. *See Parents v. Seattle School Dist.*, 149 Wn.2d 660, 674, 72 P.3d 151 (2003) (noting with approval that voluntary desegregation of public education was an appropriate exercise of discretion). The statute states, in pertinent part:

> The superintendent of public instruction, through the superintendent of schools of any school district ... may cause to be appointed voluntary adult recruits as supervisors and, from the student body of any public or private school or institution of learning, students, who shall be known as members of the "school patrol" and who shall serve without compensation and at the pleasure of the authority making the appointment.

RCW 46.61.385.

The statute is permissive in nature. If the school district finds it desirable to establish a school patrol, the method of doing so is prescribed. However, even the administrative rules give no directive and make no recommendation regarding the specific length of time a patrol should be on duty:

> The hours that patrol members are on duty shall be determined by the needs of the school area from an accident prevention standpoint and the time schedule of the school being served. The schedule of each student patrol member shall be so planned as to make it unnecessary for the student to miss regular school work for lengthy periods. Parents shall be informed of the amount of time students are scheduled to serve on patrols and how much

class time may be missed due to patrol duty.

When a patrol member has been assigned to a particular crossing, the member shall be on duty at all times students are normally crossing streets or highways in going to and from school. Members shall be at their posts 10 to 15 minutes before the first class in the morning and 10 to 15 minutes before school begins in the afternoon.

At dismissal times, arrangements shall be made for student patrol members to leave their classes 2 or 3 minutes before the dismissal bell. Patrol members shall remain on duty until the patrol captain or patrol supervisor gives the dismissal signal.

WAC 392-151-075 Hours on Duty

Crestline's school patrol was regularly on duty at the SE 7th Street crosswalk from shortly before the time the school day ended until shortly after the busses departed and no children intending to cross were visible. Since the majority of Crestline students rode the bus, the majority of students had left school grounds with the departure of the busses.

The School District did not violate any section of the applicable WACs when it allowed its school patrol to cease operations once the busses departed and no children intending to cross were visible. There is no mandate in the WACs or elsewhere that impose the length of time a school patrol must be present in the afternoon. Dismissal time is discretionary, based on the needs of the school being served.

The facts of the case at bar are unlike the facts in *Thompson v.*

Devlin, where a WAC section was utilized, along with common law negligence considerations, to defeat summary judgment and send the issue of the school district's negligence to the jury. *Thompson v. Devlin*, 51 Wn. App. 462, 467-9, 754 P.2d 1003 (1988). There, the adult school patrol individual was actively on duty and arguably failed to meet the standard of care articulated in the WAC regarding when to allow a child to cross.

M.B.'s case does not involve a violation of the WACs. Crestline's school patrol operated pursuant to its schedule and the needs of its students.

Even if the school patrol had violated some element of the WAC, that violation would be insufficient to establish duty absent the existence of a concurrent common law duty. M.B. cannot establish School District liability by claiming it had a duty pursuant to the school patrol statute or regulations without also demonstrating that the School District breached a common law duty.

There was a time when a plaintiff could establish the first two elements of a negligence claim by simply proving violation of an applicable statute, ordinance or administrative rule. By doing so, however, a plaintiff was relying on the doctrine of negligence per se.

Estate of Bruce Templeton, 98 Wn. App. 677, 682-83, 990 P.2d 968 (2000). When the legislature enacted RCW 5.40.050 in 1986, it altered the legal effect of breaching an applicable regulatory rule (with a few exceptions, none of which apply here). Now, instead of being negligence per se, breach of such a rule is only evidence of negligence. A plaintiff still "must always show the existence and breach of the common law duty of reasonable care, even though the plaintiff can show the existence and breach of an applicable statutory duty as evidence of – i.e., as a factor indicating – a breach of the common law duty." *Estate of Bruce Templeton*, 98 Wn. App. at 684. In short, a plaintiff can prevail only if a defendant breached a common law duty of reasonable care in addition to any duty not to violate a relevant regulation. *Estate of Bruce Templeton*, 98 Wn. App. at 687.

M.B. cannot show either a statutory or regulatory duty or a common law duty under the circumstances of this case.

3. A school district's common law duty is to protect the children in its custody. Crestline's school patrol had no duty to protect a Wy'East student crossing a city street well after the Crestline school patrol had been dismissed.

In this state, the law has unequivocally limited a school district's duty to "protecting the children in its custody." *Wagenblast v. Odessa School District*, 110 Wn.2d 845, 856, 758 P.2d 968 (1988). Custody has

been interpreted as including after-hours activities controlled or supervised by a school district. *Id.* However, neither this state nor any other has extended a school district's duty to the extent M.B. asks from this Court.

At common law, a school district owes its students a duty to "employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for protecting the children in its custody from such dangers." *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845, 856, 758 P.2d 968 (1988). A school district does not have a duty to protect children that are not in its custody. A school district is not automatically charged with custodial responsibility for students outside of school hours. School districts are responsible for the safety of a pupil outside of school hours only if the district assumes the control and supervision over the activity. In the words of Washington's Attorney General:

> If a district is "providing" transportation to its pupils . . . it then assumes custodial responsibility for the pupils while they are en route to or from school by means of this transportation. Otherwise, no such responsibility – and resultant duty – exist, for the rule to be derived from the cases cited herein is that a school district has no duty and therefore no potential liability with regard to supervision and protection of pupils en route to and from school unless it has exercised and assumed supervision and control, consistent with its authority, over the pupils during such time.

1968 Op. Att'y Gen. No. 24, at *4.

Although there are no Washington cases on point with the facts in this case, other jurisdictions have considered the issue and have found school districts not liable for the absence of patrols. Affirming a judgment for the defendant public school district where a kindergarten student was hit by a car while walking to school, the court in *Wright v. Arcade School District,* 230 Cal. App. 2d 272, 40 Cal. Rptr. 812 (3d Dist. 1964), held that the school district had no duty to provide a crossing guard at the intersection. Observing that a statute authorized but did not require establishment of school safety patrols, the court said that there was no statutory obligation to provide protection to pupils en route between home and school and that ordinarily, a person had no duty to take affirmative steps to protect another from harm emanating from a third person.

In an action where a kindergarten student was injured walking home from school just before noon, the court in *Jefferson County School Dist. v. Gilbert*, 725 P.2d 774, 35 Ed. Law Rep. 294 (Colo. 1986), held that the school district was not negligent in failing to post crossing guards during the late-morning time period when kindergarten students walked home from school. The court stated that, even if the school district placed crossing guards there in the afternoon, it did not follow that it also

assumed a duty to do so in the morning.

In *Gilmore v. City of Zion*, 237 Ill. App. 3d 744, 178 Ill. Dec. 671, 605 N.E. 2d 110 (2d Dist. 1992), a seven-year-old student was struck by a car while attempting to cross a roadway on her way to school. The court dismissed the school district, holding that the district owed the student no duty. The school district posted crossing guards there until 8:30 a.m., the time at which the school day started. The accident happened at 8:35 a.m. The court rejected the claim that, by voluntarily placing a crossing guard at the intersection, the school district assumed a duty to have a guard present at the time of the accident. The court found that the scope of any duty was limited to extent of the undertaking, which, in this case was the period preceding the official start of the school day. A school board had wide discretion in the exercise of its powers, the court said, and whether it exercised its power to employ a crossing guard at an intersection was solely within that discretion.

Under the undisputed facts of this case, the School District exercised its discretion and established a student patrol at Crestline. The patrol served the students during the time they were normally crossing SE 7th Street. M.B. did not arrive at the crosswalk until after the student patrol had been dismissed and had left the area. The School District had

no duty to M.B. under these circumstances.

M.B.'s assertion that five to ten Wy'East Middle School student pedestrians have been injured in the last 17 years and that roughly half of Wy'East's 900 students walk to and from school is not supported by the record and does nothing to assist M.B.'s arguments. Gary Tichnor, who was the principal of Wy'East on the date of the accident, said he really didn't know how many Wy'East students walked to and from school and that he wasn't comfortable stating that as many as ten of his students were injured in the last 17 years. CP 237-238. In any event, because Wy'East is not located on 7th Street, releases its students 20 minutes earlier than Crestline, and because there is nothing in the record about where Wy'East students might walk, or the circumstances of previous student injuries, the information is irrelevant.

4. A legal duty cannot be created by good intentions.

The fact that Crestline principal Bobbi Hite and others may have voiced belief that a school should have some responsibility for getting students home safely has no significance as to the District's legal duty of care. To recover in tort, a plaintiff must allege a breach of some duty imposed by law, rather than an educator's desire for her students' well-being.

5. Vancouver's "active school zone" lights do not impose a duty on the District.

The City of Vancouver owns and operates the flashing lights that M.B. alleges create an "active school zone," the term used by M.B.'s accident investigator, Stephen Capellas. In his declaration Capellas opined that a pedestrian crossing in a school zone shortly before or after school was crossing during "what could be considered an 'active' school zone ..." CP 266.

Nowhere in Washington law has the School District's counsel been able to locate the term "active school zone." It is neither used nor defined in the context of imposing any duties on a school district. Even the administrative rules authorized by RCW 46.61.385 do not address the term.

The independent operation of flashing lights for the Crestline school zone is completely irrelevant to this Court's determination of duty. If Mr. Capellas thinks coordinating flashing lights with school patrols is a good idea, then it is worth the effort to lobby the legislature. In the meantime, his opinion has no legal significance in establishing duty.

6. Washington's rescue doctrine does not apply because the scope of any duty voluntarily undertaken is limited to the extent of the undertaking.

Liability can arise from the negligent performance of a voluntary

undertaking, but the scope of the duty is limited to the extent of the undertaking. *Folsom v. Burger King,* 135 Wn.2d 658, 676, 958 P.2d 301 (1998). The Crestline student patrol ceased patrolling, as it always did, at around 3 p.m. on the day of the accident. That did nothing to increase the risk of harm inherent in crossing 7th Street. That risk existed even if the School District had opted not to have a student patrol at all. Yet an increased risk is what is required in order for the School District to be liable under the rescue doctrine. *Id.* at 676 ("If a rescuer fails to exercise such care and consequently increases the risk of harm to those he or she is trying to assist, the rescuer may be liable for physical damage caused.").

It simply does not follow that because Crestline elected to have a patrol in place on 7th Street during the time when most Crestline students who wanted to cross it had crossed it, that it assumed a duty to keep the patrol in place longer on the chance that an occasional District student might want to cross.

7. The cases M.B. cites do not alter the law in Washington.

M.B. cites *Chhuth v. George* as Division III's acknowledgement that a school district's failure to maintain crossing guards is a viable theory of negligence for which a school district can be found liable. And

further, that this acknowledgement is an implicit finding that a school district owes a common law duty to maintain crossing guards at certain streets.

The case does not come close to supporting M.B.'s conclusion. In *Chhuth*, the Court of Appeals reversed the trial court's finding that the school district, found guilty of negligence by a jury, proximately caused the accident as a matter of law. The trial court made the proximate cause ruling as a judgment notwithstanding the verdict after the jury's found that, although the school district was negligent, it did not proximately cause the accident. *Chhuth v. George*, 43 Wn. App. 640, 650, 719 P.2d 562 (1986).

The Court of Appeals reversed the trial court's judgment nov on proximate cause. Commenting that it had no idea on what basis the jury found the school district negligent, the Court of Appeals found that regardless of the negligence finding, there was evidence to support the jury's conclusion that said negligence was not a proximate cause of the accident. *Id.* at 651.

The Court of Appeals noted that failure to supply crossing guards was only one possible basis (others being negligent implementation and supervision of bus procedures, breach of duty by principal, breach of duty

by the first grade teacher, breach of duty by the school bus supervisor) for the jury's finding of negligence. *Id.* at 650. The Court did not endorse the legitimacy of such a finding, but only speculated about what the jury may have believed constituted negligence. Because the Court upheld the jury's finding of no liability on the part of the school district, and because there was nothing in the record indicating why the jury found the district negligent, the case lacks the precedential value ascribed by M.B.

If anything, the case supports the School District's argument that regardless of any school district negligence, when a child who is no longer in the custody of the school district is injured by a third party while crossing a city street after school, the third party's intervening negligence is the sole proximate cause. *Id.* at 650.

The Washington Supreme Court confirmed the limits of a school district's duty two years after *Chhuth.* In *Wagenblast v. Odessa School District*, 110 Wn.2d 845, 856, 758 P.2d 968 (1988), the court reiterated the limits of a school district's duty: "A school district owes a duty to its students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for protecting the children in its custody from such dangers. Thus, whatever hope M.B. had regarding *Chhuth's* impact on expanding a school district's duty is misplaced.

An Idaho court was confronted by an attempt to expand a school district's duty beyond children in its custody much in the same way M.B. attempts to do so here. The plaintiffs in *Rife* argued that because the risk of harm of being hit by a vehicle while crossing a street on the way home from school was foreseeable, the school district owed a duty to see that their son reached home safely. The court declined to extend the school district's duty, reasoning that

> We believe the common law duty arose because the parents are not in a position to protect their children while they are attending school. Thus, the school district bears that burden while the children are in its custody. However, after school has adjourned for the day, and the students have been released, the parents are free to resume control over the child's well-being. Accordingly we decline to extend a common law duty under the circumstances of this case.

Rife v. Long, 127 Idaho 841, 847, 908 P.2d 143 (1995).

The decision in *Travis v. Bohannon* also did not expand the general rule that custody is required for school district duty to exist. The plaintiff there was participating in a school sponsored activity, during the school day, for an educational purpose. The court specifically found that the school had custody by virtue of the fact that it supervised and exercised control despite the activity being off campus. *Travis v. Bohannon*, 128 Wn. App. 231, 236-238, 115 P.3d 342 (2005). The undisputed facts in the case at bar do not support an argument that M.B.

was in the School District's custody. She was off-campus, well after school ended; having full knowledge (as did her mother) that the patrol would not be at the Crestline crosswalk once the busses had departed and no children intending to cross were visible. While forseeability of harm is an element when there is school district custody, it is not a consideration when there is no such custody.

The Louisiana case of *Barnes v. Bott* is not precedent, of course, and is easily distinguished. The six-year-old pedestrian in *Barnes* was injured in a crosswalk where the school board had exercised some supervision and control. The child was injured when the crossing guard failed to show up for her assigned shift, leaving the crossing unguarded at a time and place where a guard had been assigned and was always in attendance. *Barnes v. Bott,* 571 So.2d 183 (1990).

In contrast, M.B. crossed at a time when no guard was ever in attendance, a fact well known to both M.B. and her mother.

8. The absence of Crestline's school patrol was not a proximate cause of the accident.

The trial court dismissed M.B.'s negligence case based on a lack of duty. It could easily have also dismissed the case based on the basis of proximate cause. M.B., a former Crestline school patrol member herself,

saw Reinert's vehicle leaving the parking lot and correctly ascertained that the vehicle had time to stop. The visibility was unobstructed and it was daylight. Mr. Reinert simply failed to look at the road ahead of him until the last minute. His inattention was the sole proximate cause of the accident. There is simply nothing in the record indicating that a school patrol would have prevented his inattention.

IV. CONCLUSION

The School District had neither a statutory nor a common law duty to M.B. Nor was the school patrol's absence a proximate cause of the accident. The School District is entitled to summary judgment and dismissal of all claims against it.

Respectfully submitted this 4th day of October, 2012.

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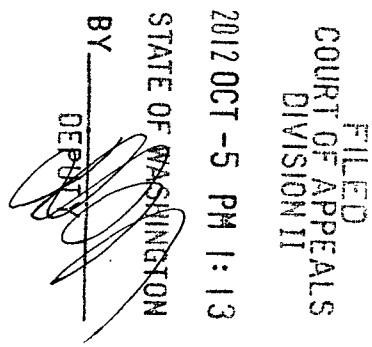
CERTIFICATE OF SERVICE

I certify that on the 4th day of October 2012, I caused the original and one copy of the foregoing document to be filed with the Court via U.S. Mail, with a copy to be served via U.S. Mail on the following counsel of record:



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